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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERALCOMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review	)	CC Docket No. 94-1
for Local Exchange Carriers	)	

JOINT PETITION FOR A PARTIAL STAY AND FOR IMPOSITION OF AN ACCOUNTING MECHANISM PENDING JUDICIAL REVIEW

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June 3, 1997

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And for Imposition of
An Accounting Mechanism
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Relief Requested

Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company (collectively, Petitioners") request that the Commission stay in part its First Report and Order in CC Docket No. 96-262, Access Charge Reform, (released May 16, 1997) (the "Access Reform Order") and its Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform (released May 21, 1997) (the "Price Cap Performance Review Order") pending judicial review. Specifically, Petitioners ask the Commission to stay the portions of those orders that require them to (a) exclude unbundled network elements from Part 69 access charges; (b) reduce their price-cap indices (PCIs) to reflect the completion of the amortization of equal access non-capitalized costs; (c) reduce their PCIs by a new productivity factor of 6.5%; and (d) reduce their PCIs due to the use of a 5.3% productivity factor in 1996, instead of the new 6.5% factor.

A petition for review will be filed in the U.S. Court of Appeals and it is anticipated that a stay from that Court will be sought if this petition is denied. To ensure that the Court has sufficient time to act on such a motion before Petitioners' 1997 annual access filings become effective on July 1, 1997, and before the orders take effect on June 17, 1997, Petitioners respectfully request that the Commission rule on this request no later than June 11, 1997.

To ensure that the stay does not impose harm on other parties, the Commission may wish to require Petitioners to account for any funds collected as a result of the stay. Any funds identified by the accounting, plus interest, can be delivered by Petitioners to customers in the event that the Commission's orders are affirmed on review. In the event that Petitioners prevail in whole or part, as they expect, the funds can be distributed in accordance with the Court's decision.

Introduction and Summary

In the May 16, 1997 Access Reform Order, the Commission held that LECs should not apply Part 69 access charges to purchasers of unbundled elements (the "Part 69 Prohibition"). The Commission did so in violation of the order of the Eighth Circuit of the U.S. Court of Appeals which expressly stayed the Commission's prior decision on this matter in the Interconnection Order.[1]

In the Price Cap Performance Review Order, the Commission was supposed to examine "the effects of price cap regulation using *all available data and information.*" Notice of Proposed Rulemaking, Price Cap Performance Review for Local Exchange Carriers, 9 FCC Rcd 1687, 1688, ¶ 9 (1994) (emphasis added) ("Price Cap Notice"). But the Commission undertook no such task. Rather than relying upon the "most recent" information concerning local exchange carrier (LEC)

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (August 8, 1996) ("Interconnection Order")

performance under price caps as promised, the Commission again relied heavily upon its old data instead.

In particular, the Commission decided to increase the X-Factor from the established three levels of 4.0, 4.7 and 5.3 percent to a single level of 6.5 percent. This decision was not based on a reasoned analysis of the new data concerning actual LEC productivity since the original price cap order. Instead, the Commission was able to derive a "corrected" 6.5 percent X-Factor only by selectively combining data and using a selective view of the record.

Rather than giving this selective view purely prospective effect, the Commission then took the additional step of applying it retroactively. As a result of the Price Cap Performance Review Order, Petitioners must take a permanent downward adjustment to their PCIs for the prior year in which they chose the "then-correct" X-factor of 5.3 percent rather than the now "correct" figure of 6.5 percent. This retroactive readjustment simply cannot be justified. If the Commission had properly included relevant data contained in its own productivity study, the 1.2 percent difference between the new X-Factor and the old one would not exist at all. (Indeed, there would be a difference, but it would be a negative, not positive, difference.) Moreover, the Commission's decision to impose this permanent reduction offends the rule against retroactive ratemaking.

Also, in the Access Reform Order, the Commission decided that the LECs would be required to make additional adjustments to the PCIs to reflect the completion of the amortization of equal access non-capitalized costs. The Commission did so notwithstanding its multiple prior decisions against doing so in the past, and notwithstanding the many actions taken by the industry in reliance upon those decisions.

The cumulative effect of the errors in the Access Reform Order and Price Cap Performance Review Order is to inflict certain and irreparable injury on Petitioners. If the Petitioners follow the Part 69 Prohibition, they will act inconsistently with the results of the Eighth Circuit's existing stay. A stay of the Access Reform Order is required to allow for the FCC and Eighth Circuit orders to be reconciled, and to prevent Petitioners from being subject to any possible penalties from following the Part 69 Prohibition.

If the PCI reductions and the Part 69 Prohibition are stayed and an accounting order is imposed, calculating the harm and delivering appropriate compensation to the adversely affected parties will be straightforward. The difference between the price actually paid and the price that would have been paid absent a stay will be fully accounted for in the Petitioners' books. If the Commission's decision is affirmed on appeal, that amount can be turned over to the Petitioners' customers; if it is reversed, it can be turned over to the Petitioners. In contrast, if no stay is imposed, calculating the harm and offering appropriate compensation through the other possible remedy -- prospective rate increases designed to recoup lost revenue -- will be difficult if not impossible to achieve. Because competition in access services grows with each passing day, there is little reason to think that a prospective rate increase, even if authorized by the Commission, would make the Petitioners whole. To the contrary, any future increase in price sufficient to compensate Petitioners for the magnitude of loss occasioned by this order is more likely to push Petitioners' customers into the arms of competitors than to produce any real recovery.

Argument

When deciding whether to grant a stay pending appeal, both the courts and the Commission traditionally consider; (1) the probability that Petitioners will prevail on the merits on appeal; (2) whether Petitioners will suffer irreparable injury absent a stay; (3) whether a stay will substantially harm other parties; and (4) whether the public interest favors preserving the status quo pending appeal.[2]

The courts have recognized that an agency considering a request to stay its own order need not confess error to grant the requested relief. To the contrary, it is enough that the agency recognize that it has ruled on concededly difficult issues and that the equities favor relief. As the D. C. Circuit explained in Holiday Tours 559 F.2d at 844-45:

> Prior recourse to the initial decision maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

For the reasons set forth below, Petitioners are entitled to a stay under either standard.

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[2] The governing standards were first set forth in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), and were modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); see also Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (applying the four factors identified in Holiday Tours). The Commission follows Holiday Tours. E.g., Order Granting Stay, Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems, Gen. Docket No. 85-301 (FCC No. 87-323), 2 FCC Rcd 6488 (1987); Memorandum Opinion and Order, MM Docket No. 86-406 RM 5480 (FCC No. 87-248) (July 17, 1987). See also Arkansas Peace Center v. Department of Pollution Control, 992 F.2d 145, 147 (8th Cir. 1993), cert. denied. 476 U.S. 1114 (1986).

I. **Petitioners Are Likely to Prevail on the Merits**

A. **The Prohibition on the Application of Access Charges to Unbundled Network Elements is Contrary to Standing Court Order and Violates the Communications Act.**

1. The Commission's Order is Contrary to the Eighth Circuit Stay

In its Interconnection Order, the Commission determined that purchasers of unbundled network elements should not be required to pay access charges.[3] To that end, the Commission promulgated rule 47 C.F.R. §51.515 entitled "Application of Access Charges." That rule states:

> (a) Neither the interstate access charges described in part 69 nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access service."

Subpart (b) of that rule permitted certain access charges to be assessed on unbundled element purchasers for a transition period, which ends June 30, 1997 at the latest.

On October 15, 1996, the Court of Appeals for the Eighth Circuit issued a stay of certain provisions contained in the Interconnection Order pending final determination of the issues on appeal. One of the provisions subject to the stay was section 51.515 of the Commission's Rules (47 C.F.R. §51.515) quoted above.[4] That stay is still in effect.[5]

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[3] Id. para. 721.

[4] Stay imposed *sub nom* Iowa Utilities Board v. FCC, No. 96-3321, (Eighth Circuit) n.3 and n. 8 ("Stay Order").

[5] Under Rule 41 of the Federal Rules of Appellate Procedures, the mandate of the court issues 21 days after the entry of judgment, unless otherwise provided by order.

Yet, on May 16, 1997, the FCC issued its Access Reform Order in Access Charge Reform wherein it held "We will adhere to our tentative conclusion to exclude unbundled network elements from Part 69 access charges. This conclusion applies to all incumbent LECs."[6] The Commission's discussion of the application of access charges to unbundled element purchasers does not refer to or even note the existing rule (§51.515) nor the stay of that rule which has been in effect since October 1996. Instead, the Commission has effectively imposed the same rule which the Eighth Circuit stayed as part of the Interconnection Order. The Commission has not explained why the Access Reform Order is consistent with the stay, nor why it should be permitted to take action inconsistent with the stay.

2. Precluding Access Charges on Unbundled Elements is Arbitrary and Capricious

a. The Commission has failed to identify the relevant subsidies in access charges.

In the Interconnection Order, the Commission promised that certain issues relating to embedded costs would be addressed in upcoming proceedings:

> The record before us, however, does not support the conclusion that significant residual embedded costs will necessarily result from the availability of network elements at economic costs. To the extent that any such residual consists of costs of meeting universal service obligations, the recovery of such costs can and should be considered in our ongoing universal service proceeding. To the extent a significant residual exists within the interstate jurisdiction that does not fall within the ambit of section 254, we intend to address that issue in our upcoming proceeding on access reform.[7]

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[6] Access Reform Order, at para. 337.

[7] Interconnection Order at para. 707 (emphasis added). During oral argument in the appeal of the Interconnection Order, FCC counsel stated that:

Yet, in both proceedings, the Commission has failed to address these issues.

First, in the Universal Service proceeding, it failed to identify the universal service subsidies present in access charges: "Consequently, we reject the arguments that section 254 compels us to remove all costs associated with the provision of universal service from interstate access charges."[8]

Second, in Access Reform, the Commission acknowledges that "we will identify the implicit federal universal service support currently contained in interstate access charges through three methods."[9] However, the Commission then admits that "we cannot remove universal service costs from interstate access charges until we can identify those costs, which we will not be able to do even for non-rural LECs before January 1, 1999"[10] and, more strikingly, admits that "we simply do not have the tools to identify the existing subsidies at this time."[11]

> There's absolutely no reason why as part of that [universal service process] a competitively neutral fund that everyone pays can't be collected and used to reimburse any stranded or embedded costs that exist. The access charge proceeding, the same possibility is there.

Iowa Utilities Board v FCC, No. 96-3321, (Eighth Circuit) Transcript of Oral Arguments of Counsel, January 17, 1997.

[8] Federal-State Joint Board on Universal Service, First Report and Order, CC Docket 96-45, (released May 8, 1997) para. 246.

[9] Access Reform Order, para. 5.

[10] Id. n.16.

[11] Id. para. 9.

Yet, despite its admission that it cannot identify what subsidies remain in access charges, the Commission reasons that "excluding access charges from the sale of unbundled elements will not dramatically affect the ability of price cap LECs to fulfill their universal service obligations."[12] Such reasoning is not supported by fact, nor by the Commission's own assumptions. If the Commission cannot identify the existing universal service subsidies present in access charges, its ruling that precluding Petitioner's ability to recover access charges from unbundled purchasers will not harm universal service is mere speculation. The Commission cannot conclude that amounts it cannot identify have no dramatic effects.

Indeed, the Commission has recently argued before the Eighth Circuit that it is critical to maintain existing access charges until the universal service proceeding could be completed: "[T]he Commission was concerned about a possible loss of access charge revenues that might adversely affect universal service. Therefore, the Commission also decided that the exchange carriers should be allowed to collect some interim charges, pending completion of proceedings to reform universal service and access charge rules, from interexchange carriers who use section 251(c)(3) elements as a substitute for access service."[13]

The Commission frankly admits in this same brief to the Eighth Circuit that "universal service funding [is] currently accomplished primarily through access charges."[14] In particular, the

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[12] Id. para. 338.

[13] Brief for Respondents, CompTel v. FCC, No. 96-3604, at 8 (Dec.23, 1996) (emphasis added). See also id. at 21 (interim access charges "are a temporary measure, with a defined expiration date not later than June 30, 1997, intended to avoid disruption of funding of universal service until the necessary universal service and access reforms are completed").

[14] Id. at 6.

CCLC and TIC "contain subsidy components that may support universal service and do not correspond with the costs of particular facilities that will be reflected in charges for section 251(c)(3) elements."[15]

To the extent subsidy continues to exist in access charges, those subsidy elements must be charged to all LEC access customers, including unbundled network element purchasers, in order to meet the statutory requirements that universal service support be "explicit and sufficient" under section 254(e). If unbundled network element purchasers do not bear the costs of universal service support still implicit in access charges, such support is not "specific, predictable and sufficient" under §254, nor, more importantly, is it competitively neutral. There will never be a time when "all" universal service subsidy is removed from access charges because of the Commission's rules on price cap LEC recovery of universal service fund contributions. The Commission has ruled that price cap LECs can only recover their contributions by exogenous adjustments to certain price cap baskets, and then only to certain rate elements.[16] Therefore, universal service support will be disproportionately funded by only some purchasers, and a LEC cannot spread its contributions to all of its access service customers. Thus, access charges will always have some universal service subsidy contained in them. To the extent subsidy exists in access charges, the Commission must permit it to be charged equally to unbundled network

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[15] Id. at 9. See also id. at 17-18 (the CCLC and TIC "produce subsidies that probably further universal service goals by indirectly producing local exchange service rates that are lower than a rate based more accurately on costs would have been . . . . [T]he charge for section 251(c)(3) elements will not provide a substitute for most of the access revenues exchange carriers now receive through the CCL charge and the TIC.")

[16] Id. para. 379.

element purchasers, or it is openly violating the competitive neutrality standard of the Telecommunications Act of 1996.

b. Precluding access charges on unbundled elements is unreasonably discriminatory.

In addition, the Commission attempts to distinguish the preclusion of access charges on unbundled purchasers from access charges assessed on resellers (which the Commission permits). The Commission claims that an entrant using resale does not have the same investment risk of an unbundled purchaser.[17] However, this is an erroneous conclusion. Neither resellers nor unbundled purchasers bear investment risk. Financial risk of investment is borne wholly by the owners of the facilities (incumbent LECs). In addition, the Commission attempts to justify this conclusion because its decision to permit access charges on resellers (in CC Docket No. 96-98) originated in the resale provisions of the Telecommunications Act of 1996. However, the source of the authority isn't determinative. Both resellers and unbundled purchasers sell the same thing--access to the network. Yet, the Commission has ordered that differing levels of charges be assessed for in essence the same functionality.

Section 202 of the Communications Act precludes a carrier from discriminating in charges for like services. To determine if a carrier has violated Section 202(a), a three step inquiry must be undertaken. First, determine whether the services are "like"; second, if they are, determine whether there is a price difference between them; and third, if there is, whether that difference is reasonable. Comptel v. FCC, 998 F.2d 1058 (D.C. Cir.1993). A service is "like"

[17] Access Reform Order at para. 340.

another if it is functionally equivalent, which "focuses on whether the services in question are different in any material functional aspect." Ad Hoc Telecommunications User Comm. v. FCC, 680 F.2d 790. 795 (D.C. Cir. 1982). The FCC must look to the nature of the services offered and determine if a user perceives the service "as the same with cost considerations being the sole determining criterion." MCI v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) Here, unbundled loops and loops which are part of resale service are functionally equivalent. The Commission recognized this in its Access Reform Notice, "Whether traffic originates locally or from a distant exchange, transport and termination of traffic by a particular LEC involves the same network functions."[18]

By forcing LECs to price unbundled loops differently from their functionally equivalent loops used to provide access and exchange service, the Commission is engaging in the same type of discrimination precluded under Section 202, resulting in an arbitrary and capricious outcome.[19]

B. The PCI Reduction For Equal Access Amortization Completion Is Arbitrary and Capricious.

In ordering an exogenous cost decrease to account for completion of the amortization of equal access non-capitalized expenses, the Commission notes that it had addressed this issue in the past and had declined to act.[20] It further notes that it recognizes that its "decision

[18] Access Charge Reform, (CC Docket No. 96-262, Notices of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry (FCC 96-488) (rel. Dec. 24, 1996). (Access Reform Notice, at para. 54.

[19] Further reasons against this discriminatory outcome are found in the "Brief for Petitioners Regional Bell Companies and GTE" filed in the U.S. Court of Appeals for the Eighth Circuit, Iowa Utilities Board v. FCC, No. 96-3321 (Eighth Circuit), at pp. 64-69.

[20] Access Reform Order at para. 302.

departs from our past decisions that have declined to impose an exogenous decrease"[21] As stated by the Commission, "our decision today reverses those decisions and is based on an extensive record from this, and prior proceedings."[22]

As the Supreme Court has said, "'An agency's view of what is in the public interest may change. . . . But an agency changing its course must supply a reasoned analysis.'"[23] When the Access Reform Order is analyzed under this standard, it cannot be sustained. The Commission is obliged to explain what in the record caused it to change its mind. The grounds listed by the Commission do not do so.

The first ground offered by the Commission is that "procedural impediments . . . [previously] convinced us to decline to impose such treatment . . .." The Access Reform Order states that no such "procedural impediments" now exist, thus allowing the FCC to change its rules. This ground is faulty, however, because the Access Reform Order does not explain what prevented the Commission in the prior proceedings from opening a rulemaking proceeding to address this issue.[24] Instead, it steadfastly refused to do so over the years, based on the merits of the issues.

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[21] Id.

[22] Id.

[23] Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 57 (1983) (quoting Greater Boston Television Corporation v. FCC 444 F.2d 841, 852 (D.C. Cir. 1970)). (Quoted also by California v. FCC 905 F.2d 1217 (9th Circuit, 1990)).

[24] The Commission has not hesitated in the past from deciding a question over whether specified costs should be treated exogenously when that question has originally arisen in a tariff proceeding. The Commission opened CC Docket No. 92-101 to deal with the exogenous treatment of accounting changes for post retirement benefits other than pensions after Bell

Secondly, the Access Reform Order now says that the prior decisions were just plain wrong, and now it is making them right. Again, however, there is no explanation of how the current record has caused the Commission to come to this conclusion. Thus, this ground provides no adequate justification for the Commission's change of heart.

The key failure in each of these arguments is that they do not rely upon the current record. Taken at face value, the Access Reform Order seems to make this decision primarily based upon the past record.[25] Under this type of analysis, no Commission decision appears to be safe as the Commission apparently feels free to reopen any issue, at any time, without any new evidence being required. Such, however, is not the law.[26]

Further, the Access Reform Order does not adequately reconcile the fact that those LECs that incur equal access costs subsequent to the implementation of price caps are not allowed

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Atlantic, U S West and Pacific Bell raised the issue in tariff filings. Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions,"CC Docket No. 92-101, Memorandum Opinion and Order (FCC 93-47) (rel. Jan. 22, 1993).

[25] Access Reform Order, at fn. 419. This assumption is unclear, since the Commission noted only a few weeks ago that the record in the past was "meager." (1993 Annual Access Tariff Filings CC Docket No. 93-193, Phase I, Part 2, Memorandum Opinion and Order (FCC 97-139) (rel. April 17, 1997) at para. 74).

[26] An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, reh. denied, 404 U.S. 877 (1971).

to make an automatic upward exogenous adjustment, but are now required to make the downward exogenous adjustment to reflect the completion of the amortization of pre-price cap equal access costs.[27] Such a discriminatory imbalance cannot be justified, nor does the Commission so attempt.

C. **The Selection of the New X-Factor and the One-Time Downward Adjustment Are Based on Wholly Arbitrary Recalculations.**

1. The Commission's Decision That the 5.3 Percent X-Factor Was "Too Low" is the Result of an Arbitrarily Selective View of the Record

As the Commission explained in the LEC Price Cap Order itself, the best indication of potential LEC productivity gains is actual LEC productivity under incentive regulation:

> [The Commission] believe[s] that the performance of the LECs over the past four years of price cap regulation provides us with *more reliable and accurate information* with respect to efficiency gains that LECs reasonably can be expected to achieve annually.[28]

Yet, when the Commission examined the propriety of the old productivity factors and selected the 6.5 percent factor to replace it, this more "reliable and accurate information" was nowhere to be found.

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[27] Access Reform Order at paras. 307 and 313. Equal access costs have been rules to be endogenous (not exogenous) since the inception of LEC price cap regulation. Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order) at para. 180.

[28] LEC Price Cap Order at 87, ¶ 191 (emphasis added). The LECs have provided substantial information concerning their actual performance under price caps. USTA Comments, CC Docket Nos. 96-262, 94-1, 91-213 and 96-263, Attachment 5, "Updated Results for the Simplified TFPRP Model and Response to Productivity Questions in FCC's Access Reform Proceeding," filed January 29, 1997; USTA Reply Comments, CC Docket No. 96-262, Attachment 10, Total Factor Productivity Review Plan, filed February 14, 1997; USTA Comments, CC Docket No. 94-1, Fourth FNPRM, Attachment A, "Total Factor Productivity Methods for Local Exchange Carrier Price Cap Plans;" and Attachment B, "Total Factor Productivity Review Plan," filed January 11, 1996.

There is a reason for this: Actual evidence of LEC productivity gains under price caps directly contradicts the Commission's chosen results. One need look no further than the Commission's decision to discover that this is so.

In support of its decision to increase the X-factor, the Commission created a table at paragraph 137 that shows the average productivity factor for various periods. The FCC found "that these averages . . . provide the most reliable basis in the current record. . . ." The Price Cap Performance Review Order then goes about "trimming" these numbers to obtain the desired result, contrary to its own prior rulings. The critical element, according to the Commission, in X-factor analysis, is actual LEC performance under price caps.[29] As noted above, the Commission has also previously explained that the best indication of potential LEC productivity gains is actual LEC productivity under incentive regulation.[30] Indeed, this part of the order claims to use a method that gives "the most weight to the most recent five estimates of annual productivity."[31] The average of these most recent five estimates, however, is 5.2%, not the 6.0% selected by the Commission. The Commission rejects the use of the 5.2% figure since it is most affected, according to the Commission, by the low 1992 figure, which it explains as "an artifact of a one-year jump in the measured productivity of the national economy as economic activity increased, rather than a change in the growth rate of LEC productivity or input prices." Because of this, the Commission determined that it should use an average which included estimates of LEC productivity more

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[29] 9 FCC Rcd at 1288, para. 9.

[30] LEC Price Cap Order at para. 191.

[31] Price Cap Performance Review Order at para. 138.

heavily weighted for the three years preceding LEC price cap regulation, thereby rejecting the 5.2% figure and adopting a 6.0% figure.[32] Thus, the Commission, contrary to its own pronouncements, dilutes the best evidence of productivity in its selective review of the record. The Price Cap Performance Review Order does not explain why the years just prior to price cap regulation should be given the weight they are in the Commission's analysis.

> The Commission is not "free to disregard those facts" simply because they "prove[d] difficult or inconvenient." Tenneco Gas v. FERC, 969 F.2d 1187, 1214 (D.C, Cir. 1992).[33] Instead, the Commission was required to explain why its analysis was nonetheless valid. Because the Commission failed to do so, its decision is not likely to survive judicial review.

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[32] The Price Cap Performance Review Order, at para. 138, notes that the USTA-generated average for the same years as the Commission's 5.2% figure, is 2.7%. Also noteworthy is the Commission's rejection of an average of the data from the years 1986 to 1995, which also results in a 5.2 percent figure.

[33] See, also Office of Consumers' Counsel v. FERC, 783 F.2d 206, 227 (D.C. Cir. 1986) (decision not based on substantial evidence where it neglects pertinent facts on the record); see Eagle-Picher Indus v. EPA, 759 F.2d 905, 921 (D.C. Cir. 1985) ("under the arbitrary and capricious standard, [the Court] look[s] to see if the agency has examined the relevant data"); Mt. Diablo Hosp. v. Shalala, 3 F.3d 1226, 1232 (9th Cir. 1993) ("an action will not be upheld where the agency has intentionally omitted evidence from consideration"); see also General Motors v. FERC, 613 F.2d 939, 944 (D.C. Cir. 1979) (decision that ignores issues relevant to public interest will be reversed).

2. The Commission Failed to Offer an Adequate Justification for Retroactive Application of the .5 Percent Consumer Productivity Dividend

The Commission erred not only by excluding relevant data when calculating the new minimum X-Factor, but also by including factors that simply did not belong. Specifically, the Commission added a .5 percent consumer productivity dividend to its 6.0 percent productivity estimate, yielding an X-Factor of 6.5 percent. The Commission, however, has not properly explained what the consumer productivity dividend is, why it has been set at .5 percent (as opposed to any other number), or why it should be included in both prospective adjustments and the retroactive one-time adjustment. The Commission claims that it included the consumer productivity dividend here for the same reasons it included one in the original price cap order: (1) to give LECs an incentive to exceed historical productivity levels during the transition from rate--of-return regulation, and (2) to ensure that consumers share in the benefits of the LECs' ability to do so. Even if one accepts these justifications as correct -- and they clearly are not[34] -- it makes no sense at all to apply the consumer productivity dividend in the one-time retroactive correction. The consumer productivity dividend was designed to induce LECs to "stretch" to exceed historical productivity levels.[35] There is no apparent justification for including a "stretch" factor as part of a

[34] It no longer makes sense to include a consumer productivity dividend above historical productivity levels, especially where data is selectively chosen so that the 6.0% factor chosen is above historical experience. Any supra-normal productivity gains resulting from the imposition of price caps have already been made. See Reply Comments of USTA, filed March 1, 1996 at pp. 25-26; Comments of USTA filed January 16, 1996, at pp. 12-14. This argument is supported by historical data, which shows declining productivity gains between 1990 and 1992. Once again, the Commission did not properly address this argument.

[35] Policy and Rules Concerning Rates for Dominant Carriers, 3 FCC Rcd 3195 (1987) at paras. 386-89.

retrospective adjustment, when the behavior to be affected has already occurred. The Commission's rationale -- to exceed history -- cannot apply when the time period for application of the X-factor is already "history." Indeed, including a "stretch factor" retrospectively is particularly pointless where actual performance data demonstrates that even the base productivity goal of 6.0% was too high for the LECs to achieve (as proven by the most recent five years of history).

Finally, even if a consumer productivity dividend of some variety could legitimately be included in a going forward application, the Commission again offers no justification for making it .5 percent instead of .1 percent, .2 percent, or 5 percent. The number instead seems to have been plucked from thin air. The Commission's authority to establish just and reasonable rates must be exercised on the basis of a record and evidence; it cannot be exercised by conjuring figures from ether.

3. The Permanent Adjustment Was Not Justified.

At bottom, the Commission's decision to force LEC prices downward was not based on valid, economically-sound predictive judgments about future LEC productivity. Since the record does not support the X-factor increase, no "reach-back" adjustment should be made. Indeed, the Price Cap Performance Order did not properly weigh, or even meaningfully discuss, the relative costs and benefits of imposing the retroactive adjustment. The Price Cap Performance Review Order implicitly admits that imposition of the adjustment may "harm . . . LEC productivity incentives." Nowhere, however, does the Price Cap Performance Review Order explain how it balances this harm against any benefit to conclude that one, not two years of retroactivity is enough. Thus, the order will likely fail judicial review since it admits harm and does not explain the basis for its ruling.[36]

Further, the Price Cap Performance Review Order claims that this retroactive adjustment is similar to the adjustment discussed by the court in Bell Atlantic v. FCC.[37] On the contrary, Petitioners understand this adjustment to be methodologically different from the one discussed in Bell Atlantic v. FCC in that the calculations to make the adjustment are different in this instance.[38] Also, it is unreasonable to justify another adjustment on the basis that the current X-factor is "interim" in that there is seemingly no limit to this claim. The Commission cannot "permanently immunize" a policy from review by continuously calling it "interim."[39]

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[36] The reviewing court has the duty "to assure that the agency has given reasoned consideration to all the material facts and issues." Greater Boston Television Corp., 444 F.2d at 851. See Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (the court is to "assure itself that the Commission has given reasoned consideration to each of the pertinent factors"); Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978).

[37] Bell Atlantic v. FCC 79 F. 3d 1195 (D.C Cir. 1996).

[38] The Commission apparently requires that the price cap LECs go back in history and restate all interstate tariff filings as if the instant application of the higher 6.5% X-factor had in fact been accomplished by the Commission so that it was effective on July 1, 1996. In the prior adjustment addressed in Bell Atlantic v. FCC, the Commission made no attempt to require LECs to restate prior historical tariff filings as if history were different than it was. The imposition of adjustments to history provide LECs with no certainty as to whether the Commission's current or prior rules provide any guidelines for making critical business decisions.

[39] CompTel v. FCC Slip Op., No. 95-1168 (D. C. Cir. 1996) at 18.

II. The Equities Favor Granting the Stay

A. A Stay Will Prevent Immediate Conflict With the Eighth Circuit's Order

Since the Commission's previous prohibition of the assessment of access charges on the purchasers of unbundled elements as contained in Section 51.515 of the Commission's rules is presently stayed by the Eighth Circuit, the Access Reform Order places Petitioners on a collision course with that Eighth Circuit Order. If Petitioners stop collecting access charges from purchasers of unbundled elements where they are presently directed to do so by state Commission decision, they will be a party to the Access Reform Order's subversion of that court order. The irreparable harm that would result from the conflict can be simply and quickly prevented by a stay of this portion of the Access Reform Order.

B. Absent Interim Relief, the Commission's Order Will Deprive LECs of Substantial Revenue Without Offering Any Prospect for Recovery.

Irreparable harm will occur from the loss of customers to competitors purchasing unbundled elements. The Commission itself has identified the irreparable injury that results when the "patchwork quilt of implicit and explicit subsidies" is permitted to continue.

> Where existing rules require an incumbent LEC to set access charges above cost for a high-volume user, a competing provider of exchange access services entering into a market can lease unbundled network elements at cost, or construct new facilities, to circumvent the access charge. In this way, a new entrant might target an incumbent LEC's high-volume access customers, for whom access charges are now set at levels significantly above economic cost."[40]

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[40] Id. ¶32. In addition, the Commission recognized that "the possible overallocation of costs to the interstate jurisdiction may, for some consumers, increase long-distance rates substantially" and that other subsidies may "generate inefficient and undesirable economic behavior." Id. at para. 30.

By refusing to identify and make explicit the implicit subsidy acknowledged to be in access, yet refusing to permit access charges on unbundled elements, the LEC's customer base is at risk from competitors serving customers through unbundled network elements.

Like the irreparable harm noted by the Eighth Circuit with respect to the proxy pricing rules for interconnection, denying assessment of access charges on unbundled elements will force the LEC to offer services to carriers at prices that are below actual costs. The Eighth Circuit found that "the threat of unrecoverable economic loss, however, does qualify as irreparable harm." It further noted that:

> Incumbent LECs would be unable to fully recover such losses merely though their participation in the market. Moreover, the petitioners potential loss of consumer goodwill qualifies as irreparable harm.[41]

Petitioners will suffer these same types of losses here since purchasers of unbundled network elements will be able to offer cheaper prices to end-users and thus lure away, possibly forever, these customers.[42]

In addition to the loss of customers and their revenues, the unjustified PCI cuts will cause further irreparable harm. The cumulative effect on Petitioners is staggering. For Southwestern Bell Telephone Company, over $85 million dollars in revenues will disappear in a single year. James L. Jones, Jr., Decl. para. 5. The effect on the industry as a whole will be a

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[41] Stay Order, citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co. 22 F.3d 546, 554 (4th Cir. 1994).

[42] James L. Jones Decl., para. 8. Lee Bauman Decl., paras. 5-7.

multiple of that number.[43] It is true, of course, that monetary loss generally does not constitute irreparable injury. See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). But that general rule only applies where "adequate compensatory or other corrective relief" is available in the ordinary course of litigation." Id. (quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). Where, in contrast, monetary loss cannot be recovered, irreparable harm is present and a stay may be appropriate.[44]

That is precisely the case here. Although the Commission is empowered to permit LECs to increase their rates to recoup losses incurred as a result of Commission decisions that are invalidated on appeal,[45] it is unlikely that the Commission could successfully exercise that authority here. Ever-expanding competition in LEC interstate access service markets already limits the ability of LECs to raise their prices and will have an even larger effect in the future.[46]

The grant of a stay and imposition of an accounting order, in contrast, will avoid irreparable injury for all. The difference between the new rates and the old ones will be otherwise accounted for by the LECs. When judicial review is terminated, the funds so identified or

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[43] Statements at the Commission's open meeting of May 7, 1997, that access charges could be reduced in the aggregate by $1.7 billion.

[44] Stay Order, section B.

[45] Both the Supreme Court and the D.C. Circuit have recognized that agencies have substantial latitude to adjust future rates to make up for the effect of reversal on appeal. See United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 229-20 (1965); Public Utils. Comm'n of California v. FERC, 988 F.2d 154, 162 (D.C. Cir. 1993). As the D.C. Circuit recently noted, "[t]his Court has previously recognized [an agency's] authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal." 988 F.2d at 162.

[46] James L. Jones, Decl. Paras. 6-7.